

HENRY, Lord Bishop of London,
AND
Peter Birch, Doctor of Divinity,
The King and Queen's Majesties, Defendants.

In a Writ of Error in Parliament brought by the Plaintiffs upon a Judgment in a Quare impedit given for Their Majesties in the Court of King's Bench by the Uniform Opinion of the whole Court, for the Presentation to the Rectory of St. James's in the Liberty of Westminster, vacant by the Promotion of Dr. Tennison to the Bishoprick of Lincoln.

Ann. Dom.
1685.
1 Jac. II.



20. Dec.
1691.
22. Dec.
1691.
23. Dec.
1691.
25. Dec.
1691.

R. Thomas Tennison being lawful Vicar of the Parish of St. Martins in the Fields, one part of the said Parish was by Act of Parliament erected into a distinct Parish and Rectory, and called by the Name of the Parish and Rectory of St. James within the Liberty of Westminster; and Dr. Tennison appointed the first Rector there.

The same Act vests the Patronage in the Bishop of London and his Successors, and Thomas Lord Jermyn and his Heirs; and then appoints in what Order and Proportion each of the said Patrons shall present; (viz.) That the First Rector after the Decease of the said Dr. Tennison, or other next Avoidance, should be Presented or Collated by the Bishop of London for the time being, and the next by the Lord Jermyn and his Heirs; the Two next by the Bishop of London and his Successors, and the next by the Lord Jermyn and his Heirs; and the like Succession of Two Turns and One Turn, for all times to come.

Dr. Tennison was duly Elected Bishop of Lincoln.

Before Dr. Tennison's Consecration, the then Archbishop of Canterbury did grant a Dispensation to him in due Form of Law, to retain and keep the Vicaridge of St. Martins, and the Rectory of St. James, together with the Bishoprick of Lincoln, until the First of July, then next following.

This was Confirmed by the King and Queen, by Letters-Patents under the Great Seal of England, (as the Statute of 25. H. 8. requires). After which, viz.

The said Bishop Elect was Consecrated; but by Virtue of the Dispensation, and according to the Rules of Law, the Living did not become Void at the time of the Consecration, (as otherwise it would have done); nor did it become Void until the First of July, 1692. at which time it voided by Cession: In which case the Crown hath an Undoubted Right to supply it by Presentation for that Turn, to whomsoever the Patronage belongs.

This Cause was several times argued at the Bar, and afterwards solemnly at the Bench, and Judgment given by the whole Court for Their Majesties.

The Matters which have been and probably may be again stirred against Their Majesties Right in this Case, are these,

I. Whether the Crown, upon the Promotion of the Incumbent of a Subject's Living to a Bishoprick, hath a Right by Prerogative to Present to that Living for the next Turn?

II. If there be such a Prerogative, yet, Whether the Dispensation and Confirmation in this Case do not amount to a serving of that Turn?

III. Whether this Act of Parliament hath made any Alteration in this Case, to differ it from the Crown's Presenting upon ordinary Vacancies in other Livings, upon the Promotion of the Incumbents?

The two first of these Points being adjudged with the Crown in the Case of St. Martins, (which was enjoyed accordingly); and there being no difference as to these Points between St. Martins and St. James, the Third Point rising upon the Act of Parliament was principally and indeed only intended to be considered in the Case of St. James's; but some of the now Plaintiffs Council stirring the Two first Points again, the Court of King's-Bench took them also into Consideration, and gave Judgment upon all Three for Their Majesties; which was done by the Uniform Opinion of the whole Court with great Clearness.

First, As to the First Point,

This Prerogative and Right of Presenting by the Crown, upon the Promotion of the Incumbent of a Subject's Living to a Bishoprick, is an Ancient Right settled and established by divers solemn Judgments in the Reigns of King Henry VIII. Queen Elizabeth, King James I. and downwards; and whenever questioned or doubted, always prevailed; and there is no one Judgment or Judicial Opinion in the Law-Books against it, but many for it. And if so full and particular an Exercise of that Prerogative doth not appear in the Old Books of the Law, as hath done in and from the Reign of King Henry VIII. downwards, it may reasonably be supposed to be occasioned by the Unlimited Power and Usurpation which the Popes of Rome assumed to themselves in this Kingdom, in making Bishops, conferring Titles to Vacant Livings, and the like, not only against the Prerogative, but even against the Statutes of the Realm. And if any Inferences have at any time been drawn from any thing said in any old Book in doubt of such Prerogative, the same have been rectified by settled Judgments in Courts for many Ages past, in times when the Learning and Integrity of the Judges admitted of no dispute.

Nor is it any Objection against this Right of the Crown, that it hath not been put in Execution in some cases anciently where the Crown had another Title, by reason of Wardship, or of the Temporalities of a Bishoprick being in the King's hands; for besides what is said before as to the Pope's Claims and Usurpations, the Crown, without prejudice to the Prerogative, might make use of that other Title not Claimed by the Pope, upon which to bring Quare Impedit (wherein one single Title must be relied on) rather than to make use of that which the Pope then Challenged and Usurped, it being improper for the King to set up his own Prerogative against himself, when he had another Title in him by way of Interest.

And it seems a strange attempt after so many Ages, and such settled Judicial Determinations, to question that point of Prerogative, whereunto (till this Case) an entire submission hath been made, and many Eminent Clergy-men of the Church of England have enjoyed, and some now do hold Livings under the Title of that Prerogative; and it appears by some Books of Presentations to Livings, in and since the Reign of Queen Elizabeth, still extant (the former being lost or destroyed) that the Crown hath presented several hundreds of times upon such Promotions, and Enjoyment were had accordingly.

II. As to the second Point about the Dispensation; that can in no sort be any Objection to the Right of the Crown; for this Dispensation being granted to the Incumbent to retain his Living, is not in Judgment of Law any Commenda, but coming before the Consecration was lawful and effectual, and the now Plaintiffs by their Pleadings in the Cause, have owned and admitted it to be so; and then thereby the Avoidance was Suspended, and no Vacancy happened by the Consecration, nor till the Dispensation expired, which was the First of July 1692. So that to affirm this Dispensation, or Confirmation, did Serve or Execute the King's turn, is to say the King used his turn before he had it, or filled a Vacancy before it was, and that not by his own, but by the Act or Instrument of the Archbishop; the Confirmation (which is the King's Act) being barely a Formality required by the Statute Hen. 8. to the Dispensation of the Archbishop.

III. As to the Third Point upon the Act of Parliament, there have been Two things Objected by the now Plaintiffs Council.

1. That St. James is a new Rectory created by Act of Parliament, and that Dr. Tennison came not into it by Presentation, but Donation; and that the Prerogative Operates only upon Presentative Livings.

2. That by the express words of the Act it is provided, That the First Rector, after the Decease of Dr. Tennison, or next Avoidance, shall be Presented or Collated by the Bishop of London.

As to the First; There is no doubt but that St. James is by the Act made a Presentative Rectory, participating of the nature of other Presentative Livings, and Dr. Tennison was continued in his former Cure, though under another name: And there is no reason in Law to make it a Donative, or otherwise than of the nature of a Presentative Living in Dr. Tennison, nor for a distinction between old and new Rectories; but the Right of the Prerogative being founded upon the Promotion of the Incumbent that holds equally both in old and new Rectories where such Promotion happens to be, and when this new Rectory voided by Promotion, then, and not till then, the Crown's Prerogative to Present arose, as much as it would or could have done in the Case of an old Presentative Living.

As to the Second, there can be no reason to think the Act intended to take away the Prerogative of the Crown, which generally speaking, is not bound, unless specially named: But the end of this Act was to Erect a New Parish and Rectory, and to make them of the same nature with other Parishes and Rectories, and to settle the Rights of each as between the Patrons and Parishioners, but in no sort to meddle with, much less to take away the Rights of the Crown; nor was there any need of a saving of the King's Right which arose by the Act by making the Rectory presentative.

And it is not of any weight to say the express words are for the Bishop's Presenting; the Intent of the Act is satisfied by settling the Ordinary Course of Presentations, without Excluding the Prerogative, and the Bishop must take his Right subject to the Rules of Law, one part of which is the Prerogative; and it hath been resolved that the Grantee of the next Presentation must give way to the Prerogative, tho he lose his Turn by it: And if this Act should be taken Literally, then there would be no Right to present by Lapse, nor Presentation by the Crown, in case of any Forfeiture, or of the Temporalities, being in the King's hands, which would be absurd to maintain; and such a literal Construction is against the Rules and Reason of Law, and many Judicial Determinations in the like Cases.

Wherefore it is prayed the Judgment may be affirmed.

John: 8. 94
given me by M^r Attorney
for 11th January 1694
Upon a View of 2nd ser
Doctor Birch
The Bishop of London and
The King May^{ty} at the
Laf.